

EXPLANATION FOR AMENDMENTS

Rule 14(b)(2)(A) and (B)(i)

Commonwealth v. Blaisdell, 372 Mass. 753 (1977), required that a defendant provide notice of a defense of lack of criminal responsibility. When Rule 14(b)(2) was originally adopted in 1979, it incorporated only the *Blaisdell* requirement. Since then other cases have held that the *Blaisdell* notice procedure applies as well to defenses based on an inability to form the requisite intent for an element of the crime, *see Commonwealth v. Diaz*, 431 Mass. 822, 829 (2000), on an inability to premeditate, *see Commonwealth v. Contos*, 435 Mass. 19, 24 n. 7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive *Miranda* rights, *see Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, *Ostrander* has indicated in *dicta* that the same would hold true in the case of a defense based on battered woman syndrome, *see, Ostrander*, 441 Mass. at 355 (2004).

The proposed amendment expands the scope of the notice provision beyond the context of *Blaisdell* to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. The Reporter's Notes explain that the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The proposed amendment also requires notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it relates to culpability, competency, or because it concerns the admissibility of evidence. This provision redresses the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession.

Rule 14(b)(2)(B)(iii)

In *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300 (2010), the Supreme Judicial Court considered the regime put in place by Rule 14(b)(2) for the disclosure of reports by mental health experts. The existing Rule only requires disclosure of the report by the Commonwealth's expert, describes the type of report in very cursory terms, and contains no provision for the judge to order any discovery beyond what Rule 14(b)(2) itself mandates.

The *Sliech-Brodeur* opinion recognized that some disclosure beyond what is already required in Rule 14(b)(2) is appropriate. It put in place an interim procedure that "require[s] the

defendant's expert to produce to the prosecution a report that includes the defense expert's opinion and the bases and reasons for this opinion," *id.* at 325, which "should be made available to the Commonwealth at the time that the judge releases the court-appointed expert's report pursuant to rule 14 (b) (2) (B) (iii), unless the parties agree to an earlier time." *Id.* at 326 n. 36.

The Court referred several issues to the Standing Advisory Committee on the Rules of Criminal Procedure for their consideration. It asked the Committee to consider:

- (1) "an amendment to rule 14(b)(2) that will reflect [the interim procedure for the defense to disclose the report of its expert, put in place by the *Sliech-Brodeur* opinion] and that will address the appropriate time that such production should take place," *Id.* at 325.
- (2) "whether, and if so when and in what form, an expert's psychological testing materials, if any, should be included in this mutual disclosure, cf. Fed.R.Crim.P. 16(b)(1)(B)"¹ *Id.* at 326.
- (3) "the appropriateness of including in rule 14(b)(2) a discretionary discovery provision similar to that in rule 14(a)(2)." *Id.*

The proposed amendments to Rule 14(b)(2)(B)(iii) address the following issues:

Timing of Disclosure

The proposed amendment now explicitly recognizes that the parties may agree on an earlier disclosure than the Rule requires. The proposal incorporates the timing sequence for disclosure of the defense expert's report that the *Sliech-Brodeur* opinion adopted. The defense expert's report must be disclosed at the time that the Commonwealth's expert's report is made available to the defense. The amendment now also requires the mutual exchange of the reports no later than when the defense expresses a "clear intent" to rely on a mental impairment defense that is based, in part, on the defendant's testimony or statements. This will often occur at the final pretrial conference or similar event. This revision attempts to avoid the delay and inconvenience of disclosing the expert reports only after the defendant's expert offers testimony on direct examination.

¹ Fed. R. Crim. P. 16(b)(1)(B) (B) : *Reports of Examinations and Tests* .

If a defendant requests disclosure under Rule 16(a)(1)(F) [dealing with requests for the results or reports of any physical or mental examination in the custody of the prosecution] and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

Scope of Report

Reports based either on psychiatric or psychological expertise should contain enough detail so that the opposing party can prepare to cross examine the expert on the basis for his or her opinion. The existing rule lends itself to the preparation and filing of very cursory reports. The Committee adopted as a model the federal practice required by 18 U.S.C. § 4247(c), which requires court appointed mental health experts to file a report containing:

- the person's history and present symptoms;
- a description of the psychiatric, psychological, and medical tests that were employed and their results;
- the examiner's findings;
- the examiner's opinions as to diagnosis and prognosis;
- and the examiner's opinion whether the person was insane at the time of the offense charged.

The Committee added to this list one additional item: "any oral or written statements made by the defendant relevant to the issue of the mental impairment for which the defendant was evaluated." This provision responds to a problem discussed in the *Sliech-Brodeur* opinion, the disadvantage that the opposing party faces in not knowing whether the mental health expert has selectively focused only on those statements of the defendant that support his or her opinion while neglecting to mention contrary statements. As a prophylactic measure against such "cherry-picking," the proposal requires the report to contain a summary of all of the statements of the defendant that are relevant to the expert's opinion. In this respect, the proposal extends beyond the way the majority dealt with this issue in *Sliech-Brodeur*.

Discretionary Discovery

The proposal explicitly gives the judge discretion to order discovery relevant to the defendant's mental condition beyond the details provided elsewhere in Rule 14(b)(2). It is, however, a very limited grant of discretion. The party seeking additional discovery under this provision must establish that the case is an unusual one. In this regard, it is more restrictive than the corresponding provision for discretionary discovery in Rule 14(a)(2).